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# The Evolving Jurisprudence of the Crime of Rape in International Criminal Law

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# THE EVOLVING JURISPRUDENCE OF THE CRIME OF RAPE IN INTERNATIONAL CRIMINAL LAW

PHILLIP WEINER\*

**Abstract:** For centuries, rape has served as a weapon of war, despite criminal prohibitions forbidding its use. Nevertheless, only in recent decades has international law made significant strides in defining and prosecuting rape as a war crime and crime against humanity. International criminal tribunals prosecuting crimes of sexual violence in prior conflict zones such as Rwanda, Sierra Leone, and the former Yugoslavia have struggled to develop a coherent definition of the elements of rape. This is largely due to the unique aspects of consent and coercion that are inherent within a surrounding context of armed conflict. This Article begins by exploring the elements of rape as defined by the major international criminal tribunals existing today, and subsequently examines the manner in which each court considers proof of consent and coercion. It then surveys some of the recent and more progressive developments in rape law jurisprudence both domestically and internationally. Finally, this Article recommends several specific steps that international criminal tribunals could employ to more effectively and equitably prosecute rape as a war crime and crime against humanity.

## INTRODUCTION

From time immemorial, soldiers have considered rape part of the spoils of war<sup>1</sup> and—more recently—the crime of rape has been used as a wartime weapon or strategy.<sup>2</sup> During the conflict in Rwanda in the 1990s, the United Nations Special Rapporteur estimated that over 250,000 women were raped, and it described the outrageous situation in the following terms:

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<sup>1</sup> See KELLY DAWN ASKIN, WAR CRIMES AGAINST WOMEN: PROSECUTION IN INTERNATIONAL WAR CRIMES TRIBUNALS 21, 33–34 (1997).

<sup>2</sup> See Prosecutor v. Sesay, Kallon & Gbao, Case No. SCSL-04-15-T, Trial Judgment, ¶¶ 950, 1347–1352, 2070 (Mar. 2, 2009), <http://www.sc-sl.org/LinkClick.aspx?fileticket=buPK1wx%2bWSo%3d&tabid=215>.

[A] great many women were raped; rape was the rule and its absence the exception. . . .  
. . . No account was taken of the person's age or condition. . . .  
Under-age children and elderly women were not spared. Other testimonies mention cases of girls aged between 10 and 12. Pregnant women were not spared either. Women about to give birth or who had just given birth were also the victims of rape in the hospitals. . . . Women who were "untouchable" according to custom (e.g. nuns) were also involved and even corpses, in the case of women who were raped just after being killed.<sup>3</sup>

Notwithstanding the prevalence of rape in times of war, prohibitions against rape were seen as early as the first century.<sup>4</sup> More recently, both international and domestic law have seen significant developments in the jurisprudence of the crime of rape over the past forty years.<sup>5</sup> Review of these developments, however, shows that international courts and tribunals are inconsistent in the way they understand the crime of rape, with differences centering primarily on the following issues: (1) whether force or lack of consent is an element of the crime; (2) whether a general or a more mechanical description of the sexual act must be used in the definition; and (3) how concern for fairness for the victim should be balanced with protection of the rights of the accused.<sup>6</sup>

Part I of this Article begins by describing how different international courts have approached the elements of rape.<sup>7</sup> Then, Part II examines how international law has treated consent and coercion with regard to rape.<sup>8</sup> Part III analyzes how international rape law has pro-

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<sup>3</sup> Special Rapporteur of the Commission on Human Rights, *Rep. on the Situation of Human Rights in Rwanda*, Comm'n on Human Rights, ¶¶ 16–17, U.N. Doc. E/CN.4/1996/68 (Jan. 29, 1996) (by René Degni-Ségui).

<sup>4</sup> PATRICIA VISEUR SELLERS, OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, *THE PROSECUTION OF SEXUAL VIOLENCE IN CONFLICT: THE IMPORTANCE OF HUMAN RIGHTS AS MEANS OF INTERPRETATION* 6 (2007), [http://www2.ohchr.org/english/issues/women/docs/Paper\\_Prosecution\\_of\\_Sexual\\_Violence.pdf](http://www2.ohchr.org/english/issues/women/docs/Paper_Prosecution_of_Sexual_Violence.pdf).

<sup>5</sup> See, e.g., N.Y. PENAL LAW § 130.00(8)(b) (McKinney Supp. 2013); Criminal Code, R.S.C. 1985, c. C-46, § 272 (Can.); Sexual Offences Act, 2003, c. 42, § 75(2)(b) (U.K.); see also *People v. Iniguez*, 872 P.2d 1183, 1186–87 (Cal. 1994) (discussing the elimination of the requirements of resistance and threat of immediate bodily harm in California rape law); *Battle v. United States*, 630 A.2d 211, 217 n.7 (D.C. 1993) (noting the abolition of the requirement that the government offer corroboration of a sexual offense victim's testimony).

<sup>6</sup> See *infra* notes 11–129 and accompanying text.

<sup>7</sup> See *infra* notes 11–129 and accompanying text.

<sup>8</sup> See *infra* notes 130–159 and accompanying text.

gressed in recent decades.<sup>9</sup> Finally, Part IV offers recommendations for how international courts should approach rape cases in the future.<sup>10</sup>

## I. ELEMENTS OF THE CRIME OF RAPE

### A. *The View of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda*

The first case to identify the elements of rape in an international setting was *Prosecutor v. Akayesu*, which was prosecuted before the International Criminal Tribunal for Rwanda (ICTR) in 1998.<sup>11</sup> In *Akayesu*, the accused was convicted of rape as a crime against humanity, in addition to genocide with rape as a predicate crime.<sup>12</sup> Although the trial chamber in *Akayesu* recognized that there was no commonly accepted definition of the crime of rape in international law, it did not explore in depth how the crime is defined in various legal systems.<sup>13</sup> Rather, the trial chamber defined rape as “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.”<sup>14</sup> The chamber further explained that

coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or the military presence of Interahamwe among refugee Tutsi women.<sup>15</sup>

By adopting the phrase “a physical invasion of a sexual nature,” the trial chamber rejected the traditional definition of rape.<sup>16</sup> Traditionally, rape had been limited not only in terms of the gender of the perpetrator and victim but also in terms of the prohibited act or acts.<sup>17</sup> Reason-

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<sup>9</sup> See *infra* notes 160–198 and accompanying text.

<sup>10</sup> See *infra* notes 199–215 and accompanying text.

<sup>11</sup> See Case No. ICTR-96-4-T, Trial Judgment, ¶¶ 685–696 (Sept. 2, 1998), <http://www.unictr.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf>.

<sup>12</sup> *Id.* ¶¶ 696, 734.

<sup>13</sup> See *id.* ¶ 686.

<sup>14</sup> *Id.* ¶ 598.

<sup>15</sup> *Id.* ¶ 688.

<sup>16</sup> See *id.* ¶ 598; JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 33.01[A]–[B], at 567 n.2, 568 (6th ed. 2012); 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 17.2, at 605, 610 (2d ed. 2003).

<sup>17</sup> See DRESSLER, *supra* note 16, § 33.01, at 567 n.2, 568; 2 LAFAVE, *supra* note 16, § 17.1–.2, at 605, 610.

ing that “the central elements of the crime of rape cannot be captured in a mechanical description of objects or body parts,” the trial chamber provided broad latitude for the nature of the sexual acts included within the crime of rape.<sup>18</sup>

The *Akayesu* trial chamber’s expansive definition of rape diverges from the traditional definition in two specific ways.<sup>19</sup> First, the chamber’s definition includes forced oral or anal sex, as well as the insertion of a finger or tongue into the vagina. In contrast, under the traditional common law approach, those acts are classified as various sexual offenses, including sodomy or some other form of sexual violence.<sup>20</sup> Second, because the *Akayesu* definition is gender neutral, a male could be a victim and a female could be a perpetrator.<sup>21</sup> This diverges from the traditional common law understanding of rape as a crime that a male commits upon a female, allowing for conviction of a female only by virtue of accomplice liability.<sup>22</sup>

The ICTR’s decision in *Akayesu* had two other notable features. First, although *Akayesu* required that the acts be committed under coercive circumstances, the decision provided significant latitude in determining what constitutes coercion.<sup>23</sup> Second, the trial chamber’s definition did not address the elements of lack of consent or mens rea, and the appeal in *Akayesu* did not raise any issues relating to the elements of the crime of rape.<sup>24</sup>

Four months after the ICTR trial chamber decision in *Akayesu*, in December 1998, a trial panel of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in *Prosecutor v. Furundžija* charged the crime of rape as a violation of Common Article III of the Geneva Conventions.<sup>25</sup> Recognizing the absence of a generally accepted definition

<sup>18</sup> See *Akayesu*, Case No. ICTR-96-4-T, Trial Judgment, ¶ 597.

<sup>19</sup> See *id.*; DRESSLER, *supra* note 16, § 33.01[A], at 567 n.2; 2 LAFAYE, *supra* note 16, § 17.2(a), at 610–11.

<sup>20</sup> See DRESSLER, *supra* note 16, § 33.01, at 567 n.2.

<sup>21</sup> See *Akayesu*, Case No. ICTR-96-4-T, Trial Judgment, ¶ 597.

<sup>22</sup> See 2 LAFAYE, *supra* note 16, § 17.2(a), at 610–11.

<sup>23</sup> See *Akayesu*, Case No. ICTR-96-4-T, Trial Judgment, ¶ 688.

<sup>24</sup> See *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Appeal Judgment, ¶ 10 (June 1, 2001), <http://www.unhcr.org/refworld/pdfid/4084f42f4.pdf> (summarizing the grounds of appeal); *Akayesu*, Case No. ICTR-96-4-T, Trial Judgment, ¶ 688; see also Catharine A. MacKinnon, Essay, *Defining Rape Internationally: A Comment on Akayesu*, 44 COLUM. J. TRANSNAT’L L. 940, 950 (2006) (“[T]he ICTR grasped that inquiring into individual consent to sex for acts that took place in a clear context of mass sexual coercion made no sense at all.”).

<sup>25</sup> Case No. IT-95-17/1-T, Trial Judgment, ¶¶ 43, 274 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998), <http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf>.

of rape in international law,<sup>26</sup> the ICTY drew “upon the general concepts and legal institutions common to all the major legal systems of the world”<sup>27</sup> to arrive at an “accurate definition of rape.”<sup>28</sup> Whereas the chamber initially referred to the *Akayesu* definition, it later ignored it when constructing its own definition.<sup>29</sup>

The ICTY trial panel’s decision in *Furundžija* identified the following elements of the crime of rape:

- (i) the sexual penetration, however slight:
  - (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
  - (b) of the mouth of the victim by the penis of the perpetrator;
- (ii) by coercion or force or threat of force against the victim or a third person.<sup>30</sup>

This definition followed more closely the traditional common law understanding of rape than did the ICTR’s definition of rape in *Akayesu*.<sup>31</sup> For example, the *Furundžija* definition required that the perpetrator be male unless a female had used an object or had served as an accessory.<sup>32</sup> Also, under the *Furundžija* definition, certain forms of sexual activity such as forced digital penetration did not constitute rape.<sup>33</sup> Furthermore, under the *Furundžija* definition, force or coercion was clearly an element of the crime.<sup>34</sup>

The *Furundžija* trial panel’s definition of rape went, to some extent, beyond the traditional definition of rape. For example, the decision classified forced oral sex as rape even though it noted that—in

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<sup>26</sup> *Id.* ¶ 175.

<sup>27</sup> *Id.* ¶ 178.

<sup>28</sup> *Id.* ¶ 177.

<sup>29</sup> *See id.* ¶ 176.

<sup>30</sup> *Id.* ¶ 185.

<sup>31</sup> *See* Cassia C. Spohn, *The Rape Reform Movement: The Traditional Common Law and Rape Law Reforms*, 39 JURIMETRICS 119, 122 (1999) (“The traditional [definition] did not include attacks on male victims, acts other than sexual intercourse, sexual assaults with an object, or sexual assaults by a spouse.”). *Compare id.* (dictating elements that incorporate the gender of the accused), *with Akayesu*, Case No. ICTR-96-4-T, Trial Judgment, ¶ 597 (dictating a gender neutral set of elements).

<sup>32</sup> *See Furundžija*, Case No. IT-95-17/1-T, Trial Judgment, ¶ 185; *see also* 3 CHARLES E. TORCIA, WHARTON’S CRIMINAL LAW § 279, at 36 (15th ed. 1993) (“Given the ordinary definition of sexual intercourse, as at common law, rape may be committed only by a male and it may be committed only upon a female.”).

<sup>33</sup> *See Furundžija*, Case No. IT-95-17/1-T, Trial Judgment, ¶ 185.

<sup>34</sup> *See id.*

some countries—forced oral sex constitutes only sexual assault.<sup>35</sup> Finding no violation of the *nullum crimen sine lege* (“no crime without law”) principle, the panel justified this classification based on the serious nature of the act.<sup>36</sup> Moreover, the *Furundžija* trial judgment went beyond the traditional common law definition of rape by including “threats of force against . . . a third person,”<sup>37</sup> to acknowledge the situation in which a woman agrees to sexual relations only in response to a threat made against her child or another family member.<sup>38</sup> Similar language has been added to statutes dealing with the crime of rape in some common law jurisdictions.<sup>39</sup> As in the ICTR’s *Akayesu* case, the appeal in *Furundžija* did not raise issues related to the ICTY trial chamber’s definition of the crime of rape.<sup>40</sup>

In 2001, just over two years after *Furundžija*, the ICTY decided *Prosecutor v. Kunarac, Kovac & Vokovic*, the court’s seminal case relating to the crime of rape.<sup>41</sup> In *Kunarac*, the accused were charged with the crime of rape as a violation of Common Article III and as a crime against humanity.<sup>42</sup> The *Kunarac* trial judgment addressed all three principal inconsistencies in the definitions of the crime of rape under international law.<sup>43</sup>

As in *Furundžija*, the trial panel in *Kunarac* initially noted that there was no definition of the crime of rape in international humanitarian law or in the tribunal’s statute.<sup>44</sup> Thus, in order to arrive at a proper definition, the trial panel conducted a survey to determine “whether it is possible to identify certain basic principles, or . . . ‘com-

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<sup>35</sup> *Id.* ¶ 183.

<sup>36</sup> *Id.* ¶ 184.

<sup>37</sup> *Id.* ¶ 174.

<sup>38</sup> See, e.g., *Prosecutor v. Marković*, Case No. X-KR-09/948, Trial Verdict, 40 (Court of Bosn. & Herz. Apr. 15, 2011) (analyzing a rape where the accused threatened to kill the victim’s brother), *aff’d*, Dec. 28, 2011; *Prosecutor v. Nikačević*, Case No. X-KR-08/500, Trial Verdict, 40, 42 (Court of Bosn. & Herz. Feb. 19, 2009) (same), *aff’d*, July 12, 2010.

<sup>39</sup> See e.g., N.Y. PENAL LAW § 130.00(8)(b) (McKinney Supp. 2013); Criminal Code, R.S.C. 1985, c. C-46, § 272 (Can.); Sexual Offences Act, 2003, c. 42, § 75(2)(b) (U.K.).

<sup>40</sup> See *Prosecutor v. Furundžija*, Case No. IT-95-17/1-A, Appeal Judgment, ¶ 207 (Int’l Crim. Trib. for the Former Yugoslavia July 21, 2000), <http://www.icty.org/x/cases/furundzja/acjug/en/fur-aj000721e.pdf>.

<sup>41</sup> See Case Nos. IT-96-23-T & IT-96-23/1-T, Trial Judgment, ¶ 436 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001), <http://www.icty.org/x/cases/kunarac/tjug/en/kun-tj010222e.pdf>.

<sup>42</sup> *Id.*

<sup>43</sup> See *id.* ¶¶ 436–461.

<sup>44</sup> See *id.* ¶¶ 437, 439. Although Article 5(g) of the Statute of the International Criminal Tribunal for the Former Yugoslavia identified rape as a potential crime, it did not identify its elements. See *id.* ¶¶ 436–437.

mon denominators', in those legal systems which embody the *principles* which must be adopted in the international context."<sup>45</sup>

Upon completing its survey, the trial panel found that

the *actus reus* of the crime of rape in international law is constituted by: the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances. The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.<sup>46</sup>

This definition adopted a traditional formulation of the *actus reus* of rape.<sup>47</sup> Section (a) and the first clause in section (b) were taken verbatim from the trial verdict in *Furundžija*.<sup>48</sup> The *Kunarac* definition, however, removed "coercion or force or threat of force" from the *Furundžija* definition and instead adopted "lack of consent" as an element.<sup>49</sup> At trial, the prosecutor argued that lack of consent was not an element of the crime of rape but force and coercion were.<sup>50</sup> The trial panel disagreed with the prosecutor based on its survey of major legal systems; it stated that "the basic underlying principle common to them was that sexual penetration will constitute rape if it is not truly voluntary or consensual on the part of the victim."<sup>51</sup>

The trial panel also added a two-part *mens rea* requirement, which further protects the rights of the accused.<sup>52</sup> The *mens rea* element requires not only proof of a general intent to effect the sexual act, but also proof that the accused knew the sexual act was taking place with-

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<sup>45</sup> *Id.* ¶ 439 (footnote omitted).

<sup>46</sup> *Id.* ¶ 460.

<sup>47</sup> See DRESSLER, *supra* note 16, § 33.04[A], at 574; 2 LAFAYE, *supra* note 16, § 17.2, at 609.

<sup>48</sup> See *Furundžija*, Case No. IT-95-17/1-T, Trial Judgment, ¶ 185.

<sup>49</sup> Compare *id.* (defining rape as "sexual penetration . . . by coercion or force or threat of force"), with *Kunarac*, Case Nos. IT-96-23-T & IT-96-23/1-T, Trial Judgment, ¶ 460 (defining rape as "sexual penetration . . . without the consent of the victim").

<sup>50</sup> *Kunarac*, Case Nos. IT-96-23-T & IT-96-23/1-T, Trial Judgment, ¶ 461.

<sup>51</sup> *Id.* ¶¶ 439–441.

<sup>52</sup> See *id.* ¶ 460.



out the victim's consent.<sup>53</sup> This latter requirement would allow for a "reasonable mistake of fact" defense.<sup>54</sup> The trial panel, however, did not provide any reasoning to support its requirement that the accused knew the victim did not consent.

On appeal, the appellants challenged the trial panel's definition of rape.<sup>55</sup> They argued that the "use of coercion or force"—as opposed to "lack of consent"—was a basic element of the crime of rape.<sup>56</sup> The prosecution responded that the trial panel's adopted definition was proper.<sup>57</sup> The appeals panel rejected the appellants' argument.<sup>58</sup> The panel reasoned that "the trial chamber did not disavow the Tribunal's earlier jurisprudence, but instead sought to explain the relationship between force and consent. *Force or threat of force provides clear evidence of non-consent, but force is not an element per se of rape.*"<sup>59</sup> The appeals panel further noted that a "narrow focus on force or threat of force" would be inappropriate and allow for "perpetrators to evade liability."<sup>60</sup>

By excluding force as an element of rape, the appeals panel significantly changed the elements of the crime. The appeals panel stated that the trial panel did not reject the *Furundžija* definition of rape, but simply "sought to explain the relationship between force and consent."<sup>61</sup> Close review of the decision, however, does not support this view. The elements of the *actus reus* identified in the two cases are clearly different.<sup>62</sup> In fact, force and consent have traditionally served as separate and distinct elements, "each of which must independently be satis-

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<sup>53</sup> See *id.*; Rebecca L. Haffajee, Note, *Prosecuting Crimes of Rape and Sexual Violence at the ICTR: The Application of Joint Criminal Enterprise Theory*, 29 HARV. J.L. & GENDER 201, 210 (2006) (indicating that a "high standard for *mens rea*" was adopted by the ICTY in cases following *Kunarac*).

<sup>54</sup> See 2 LAFAYE, *supra* note 16, § 17.2(b), at 615–19; see also DPP v. Morgan, [1976] A.C. 182 (H.L.) 203–04, 214, 215, 237, 239 (appeal taken from Eng.) (holding that a mistake of fact as to consent must be genuine but need not be reasonable).

<sup>55</sup> Prosecutor v. Kunarac, Kovac & Vukovic, Case Nos. IT-96-23 & IT-96-23/1-A, Appeal Judgment, ¶ 125 (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2002), <http://www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf>.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* ¶ 126.

<sup>58</sup> *Id.* ¶ 128.

<sup>59</sup> *Id.* ¶ 129 (emphasis added).

<sup>60</sup> *Id.*

<sup>61</sup> *Kunarac*, Case Nos. IT-96-23-T & IT-96-23/1-A, Appeal Judgment, ¶ 129.

<sup>62</sup> See *supra* note 49 and accompanying text.

fied.”<sup>63</sup> Force, threats, and coercion focus on the acts of the accused, whereas voluntary consent relates to the mental state of the victim.<sup>64</sup>

Almost three years later, in 2005, in *Prosecutor v. Muhimana*, an ICTR trial panel again considered the proper definition of the crime of rape.<sup>65</sup> In that case, the accused was charged with rape as a crime against humanity.<sup>66</sup> At trial, both the prosecution and the accused endorsed the definition of rape as adopted in *Akayesu*.<sup>67</sup> The trial chamber in *Muhimana* concluded that the two working definitions of rape (in *Akayesu* and *Kunarac*) are not incompatible.<sup>68</sup> In its judgment, the trial chamber initially described the case law history of the crime of rape at the ICTY and ICTR, noting that some trial courts had followed the *Kunarac* definition whereas others had relied upon *Akayesu*.<sup>69</sup> In reviewing these cases, the trial chamber noted that the “*Kunarac* Appeals Chamber . . . was not called upon to consider the *Akayesu* definition.”<sup>70</sup> The chamber further noted that, although the *Kunarac* definition had been viewed as a departure from the definition of rape adopted in *Akayesu*, the two definitions are actually “substantially aligned.”<sup>71</sup>

The trial chamber explained the matter as follows:

The Chamber takes the view that the *Akayesu* definition and the *Kunarac* elements are not incompatible or substantially different in their application. Whereas *Akayesu* referred broadly to a “physical invasion of a sexual nature”, *Kunarac* went on to articulate the parameters of what would constitute a physical invasion of a sexual nature amounting to rape.<sup>72</sup>

Based on this reasoning, the ICTR trial chamber endorsed “the conceptual definition of rape established in *Akayesu*, which encompasses

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<sup>63</sup> See *Commonwealth v. Lopez*, 745 N.E.2d 961, 965 (Mass. 2001); 2 LAFAVE, *supra* note 16, § 17.4, at 637–38.

<sup>64</sup> See Wolfgang Schomburg & Ines Peterson, *Genuine Consent to Sexual Violence Under International Criminal Law*, 101 AM. J. INT’L L. 121, 138 (2007).

<sup>65</sup> Case No. ICTR-95-1B-T, Trial Judgment and Sentence, ¶ 536 (Apr. 28, 2005), <http://www.unict.org/Portals/0/Case/English/Muhimana/decisions/muhimana280505.pdf>.

<sup>66</sup> *Id.* ¶ 534.

<sup>67</sup> *Id.* ¶ 535.

<sup>68</sup> *Id.* ¶ 550.

<sup>69</sup> *Id.* ¶¶ 537–548.

<sup>70</sup> *Id.* ¶ 543.

<sup>71</sup> *Muhimana*, Case No. ICTR-95-1B-T, Trial Judgment and Sentence, ¶ 549.

<sup>72</sup> *Id.* ¶ 550.

the elements set out in *Kunarac*.<sup>73</sup> Utilizing this definition, the trial chamber determined that the accused was criminally liable.<sup>74</sup>

The trial chamber, however, did not explain how it reconciled the differing definitions of the crime of rape in *Akayesu* and *Kunarac*. Additionally, it did not explain how it applied the resulting definition to the facts of the case before it. Consequently, the trial chamber in *Muhimana* left more questions about the elements of rape under international law open and undecided.

Fourteen months later, in 2006, in *Gacumbitsi v. Prosecutor*, the ICTR appeals chamber finally determined the proper definition of rape.<sup>75</sup> In *Gacumbitsi*, the accused was convicted of rape as a crime against humanity.<sup>76</sup> Arguing on appeal that the judgment should be affirmed, the prosecutor submitted that lack of consent and the accused's knowledge thereof are not elements of the crime of rape.<sup>77</sup> Instead, the prosecutor argued that rape should be viewed in the same manner "as torture or enslavement, for which the Prosecution is not required to establish absence of consent."<sup>78</sup>

The appeals chamber rejected the prosecution's argument, thus adopting the *Kunarac* definition of rape.<sup>79</sup> The appeals chamber explained that "*Kunarac* establishes that non-consent and knowledge thereof are elements of rape as a crime against humanity. The import of this is that the Prosecution bears the burden of proving these elements beyond reasonable doubt."<sup>80</sup>

*Gacumbitsi* finally reconciled the two divergent definitions of rape used in the ICTY and ICTR.<sup>81</sup> This result is not surprising because the ICTY and ICTR share the same appeals chamber.<sup>82</sup> In fact, four of the five appellate judges who sat on the *Gacumbitsi* appeal also participated in the *Kunarac* appeal.<sup>83</sup> The *Gacumbitsi* appeal judgment established

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<sup>73</sup> *Id.* ¶ 551.

<sup>74</sup> *Id.* ¶¶ 552–553, 561–563.

<sup>75</sup> See Case No. ICTR-2001-64-A, Appeal Judgment, ¶ 152 (July 7, 2006), [http://www.unictl.org/Portals/0/Case/English/Gacumbitsi/judgement/judgement\\_appeals\\_070706.pdf](http://www.unictl.org/Portals/0/Case/English/Gacumbitsi/judgement/judgement_appeals_070706.pdf).

<sup>76</sup> *Id.* ¶ 3.

<sup>77</sup> *Id.* ¶ 147.

<sup>78</sup> *Id.* ¶ 149.

<sup>79</sup> *Id.* ¶ 152.

<sup>80</sup> *Id.* ¶ 153.

<sup>81</sup> See *Gacumbitsi*, Case No. ICTR-2001-64-A, Appeal Judgment, ¶¶ 152–153.

<sup>82</sup> ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 136 (2d ed. 2010).

<sup>83</sup> Each case involved an appellate panel consisting of five judges, with the same four judges sitting on both cases: Judge Mehmet Guney, Judge Theodor Meron, Judge Mohamed

that a more traditional definition of rape—as opposed to the more expansive definition in *Akayesu*—applies in both the ICTY and ICTR.

### B. *The International Criminal Court Definition*

Those who established the International Criminal Court (ICC) had the opportunity to review and consider the ICTY and ICTR cases when they developed the elements of the crime of rape for the ICC.<sup>84</sup> In the ICC, the elements of rape are the same, regardless of whether rape is prosecuted as a war crime or as a crime against humanity.<sup>85</sup> The ICC defines the actus reus of rape as:

1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.<sup>86</sup>

The ICC derived this definition from the *Akayesu*, *Furundžija*, and *Kunarac* judgments.<sup>87</sup> The first paragraph effects a compromise between the traditional and the more expansive definitions of the sexual act of rape by allowing for prosecution of various forms of forced sexual activity not covered under most traditional definitions. Specifically, the reference to sexual penetration by “any part of the body” would allow for the prosecution of rape when the forced act is by means of a finger or

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Shahabuddeen, and Judge Wolfgang Schomburg. See *Gacumbitsi*, Case No. ICTR-2001-64-A, Appeal Judgment; *Kunarac*, Case Nos. IT-96-23-T & IT-96-23/1-A, Appeal Judgment.

<sup>84</sup> The Rome Statute of the ICC (“Rome Statute”) established the ICC. See generally Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute] (establishing the ICC and including rape as a crime against humanity and a war crime).

<sup>85</sup> Assembly of States Parties to the Rome Statute of the Int’l Criminal Court, 1st Sess., Sept. 3–10, 2002, art. 7(1)(g)-1, 8(2)(b)(xxii)-1, 8(2)(e)(vi)-1, U.N. Doc. ICC-ASP/1/3 (2002) [hereinafter Assembly of Parties to the Rome Statute]; see Rome Statute, *supra* note 84, art. 7–8 (outlining rape as a war crime and crime against humanity).

<sup>86</sup> Assembly of Parties to the Rome Statute, *supra* note 85, art. 7(1)(g)-1, 8(2)(b)(xxii)-1, 8(2)(e)(vi)-1 (footnotes omitted).

<sup>87</sup> See *supra* notes 11–74 and accompanying text.

the tongue. The definition is also gender neutral as to both perpetrator and victim.<sup>88</sup>

Unlike the definition of rape used in the ICTY and ICTR, which requires “absence of consent,” the ICC utilizes “force or coercion” as an element.<sup>89</sup> The ICC’s definition gives broad latitude to the terms “coercion” and “force” in order to anticipate the full range of circumstances arising in wartime. In particular, a threat against a third person is sufficient to satisfy this element.

Finally, the ICC’s definition and treatment of consent tracks trends in domestic approaches to rape. By including language concerning acts “committed against a person incapable of giving genuine consent,” the ICC’s definition recognizes that certain persons, due to age, mental or physical condition, or infirmity, are incapable of providing consent to sexual activity.<sup>90</sup> This feature of the ICC definition corresponds with recent domestic legislative modifications that protect persons who, for various reasons, lack the capacity to consent.<sup>91</sup>

Although mens rea is not included within the elements of the crime, Article Thirty of the Rome Statute of the ICC (“Rome Statute”) requires that the “material elements are committed with intent and knowledge.”<sup>92</sup> Therefore, to have the required mens rea, the perpetrator must (1) intend to invade the body of a person resulting in penetration, and (2) know that the invasion was committed through the use of force, threats, coercion, or by taking advantage of a coercive environ-

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<sup>88</sup> This is an important modification because men were also victims of rape during the armed conflict in Bosnia and Herzegovina. *See, e.g.*, Prosecutor v. Lazarević, Stanojević & Ostojić, Case No. X-KRŽ-06/243, Trial Verdict, ¶¶ 195, 197, 201 (Court of Bosn. & Herz. Sept. 22, 2010), [http://www.worldcourts.com/wcsbih/eng/decisions/2010.09.22\\_Prosecutors\\_Office\\_of\\_BiH\\_v\\_Lazarevic\\_et\\_al.pdf](http://www.worldcourts.com/wcsbih/eng/decisions/2010.09.22_Prosecutors_Office_of_BiH_v_Lazarevic_et_al.pdf); Prosecutor v. Česić, Case No. IT-95-10/1-S, Sentencing Judgment, ¶ 52 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 11, 2004), <http://www.icty.org/x/cases/cesic/tjug/en/ces-tj040311e.pdf>; Prosecutor v. Todorovic, Case No. IT-95-9/1-S, Sentencing Judgment, ¶¶ 36–41 (Int’l Crim. Trib. for the Former Yugoslavia July 31, 2001), <http://www.icty.org/x/cases/todorovic/tjug/en/tod-tj010731e.pdf>.

<sup>89</sup> Compare Assembly of Parties to the Rome Statute, *supra* note 85, art. 7(1)(g)-1, 8(2)(b)(xxii)-1, 8(2)(e)(vi)-1 (“The invasion was committed by force, or by threat of force or coercion.”), with *Gacumbitsi*, Case No. ICTR-2001-64-A, Appeal Judgment, ¶ 154 (“[A]bsence of consent . . . is an element of the crime.”) (quoting *Kunarac*).

<sup>90</sup> See Assembly of Parties to the Rome Statute, *supra* note 85, art. 7(1)(g)-1, 8(2)(b)(xxii)-1, 8(2)(e)(vi)-1; *see also* Prosecutor v. Brima, Kamara & Kanu, Case No. SCSL-2004-16-T, Trial Judgment, ¶ 694 (June 20, 2007), <http://www.sc-sl.org/LinkClick.aspx?fileticket=EqikfVSpLWM=&tabid=106> (noting that “[c]hildren below the age of 14 cannot give valid consent”).

<sup>91</sup> *See, e.g.*, N.Y. PENAL LAW § 130.05(3) (McKinney Supp. 2013); Sexual Offences Act, 2003, c. 42, § 30–33 (U.K.).

<sup>92</sup> Rome Statute, *supra* note 84, art. 30(1).

ment, or a person incapable of voluntarily consenting.<sup>93</sup> Thus, although the ICC definition of rape does not explicitly require knowledge of “lack of consent,” it does provide a two-part mens rea requirement that allows for a mistake of fact defense.<sup>94</sup>

### C. Elements Defined by the Special Court of Sierra Leone

The Special Court of Sierra Leone (SCSL) has also dealt with the issue of defining the crime of rape.<sup>95</sup> Initially, in the 2007 case of *Prosecutor v. Brima, Kamara & Kanu*, the accused were charged with rape as a crime against humanity.<sup>96</sup> After reviewing the jurisprudence of the ICTY, ICTR, and ICC, the trial chamber adopted the following definition of rape:

1. The non-consensual penetration, however slight, of the vagina or anus of the victim by the penis of the perpetrator or by any other object used by the perpetrator, or of the mouth of the victim by the penis of the perpetrator; and
2. The intent to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.<sup>97</sup>

This definition is similar to the one that the ICTY trial chamber adopted in *Kunarac*.<sup>98</sup> As in *Kunarac*, the *Brima* trial chamber explained that “force or threat of force” were factors establishing “lack of consent,” but were not an element of the crime of rape.<sup>99</sup> Also, as in *Kunarac*, the *Brima* trial chamber did not provide any basis for an enhanced mens rea requirement.<sup>100</sup>

<sup>93</sup> See Eve La Haye, *Article 8(2)(b)(xxii)—Rape, Sexual Slavery, Enforced Prostitution, Forced Pregnancy, Enforced Sterilization, Sexual Violence*, in *THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE* 184, 190 (Roy S. Lee ed., 2001).

<sup>94</sup> See Rome Statute, *supra* note 84, art. 30(1); see also Rosanna Cavallaro, *A Big Mistake: Eroding the Defense of Mistake of Fact About Consent in Rape*, 86 J. CRIM. L. & CRIMINOLOGY 815, 817 (1996) (“Where an offense requires a particular mental state, such as knowledge or purpose, an honest and reasonable belief that precludes a defendant from forming or maintaining that mental state will preclude conviction.”).

<sup>95</sup> See, e.g., *Sesay*, Case No. SCSL-04-15-T, Trial Judgment, ¶ 143; *Brima*, Case No. SCSL-2004-16-T, Trial Judgment, ¶¶ 14, 210.

<sup>96</sup> Case No. SCSL-2004-16-T, Trial Judgment, ¶¶ 14, 210.

<sup>97</sup> *Id.* ¶ 693.

<sup>98</sup> See *Kunarac*, Case Nos. IT-96-23-T & IT-96-23/1-T, Trial Judgment, ¶ 460.

<sup>99</sup> See *id.* ¶ 458, 460; *Brima*, Case No. SCSL-2004-16-T, Trial Judgment, ¶ 694.

<sup>100</sup> See *Kunarac*, Case Nos. IT-96-23-T & IT-96-23/1-T, Trial Judgment, ¶ 460; *Brima*, Case No. SCSL-2004-16-T, Trial Judgment, ¶ 694. On appeal from the trial judgment in *Brima*, the parties did not contest the definition of the crime of rape. *Prosecutor v. Brima, Kamara & Kanu*, Case No. SCSL-2004-16-A, Appeal Judgment, ¶¶ 28–30 (Feb. 22, 2008), <http://www.sc-sl.org/LinkClick.aspx?fileticket=cXQsdyBfVgg%3d&tabid=173>.

Two years later, in the 2009 case *Prosecutor v. Sesay, Kallon & Gbao*, a trial chamber of the SCSL adopted a different definition of the crime of rape.<sup>101</sup> In that case, the accused were charged with rape as a crime against humanity.<sup>102</sup> The chamber reviewed the history of rape as a war crime and identified the elements as follows:

- (i) The Accused invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the Accused with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body;
- (ii) The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or another person or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent;
- (iii) The Accused intended to effect the sexual penetration or acted in the reasonable knowledge that this was likely to occur; and
- (iv) The Accused knew or had reason to know that the victim did not consent.<sup>103</sup>

The first two paragraphs derive from the ICC's definition of rape.<sup>104</sup> The third and fourth paragraphs emanate from the *Kunarac* trial judgment, and are not included in the ICC elements.<sup>105</sup>

The *Sesay* decision elaborated on the language used in the first two paragraphs of this definition.<sup>106</sup> With regard to the first paragraph, the chamber explained the wide latitude given to sexual acts, noting that:

The first element of the *actus reus* defines the type of invasion that is required to constitute the offence of rape and covers two types of penetration, however slight. The first part of the

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<sup>101</sup> Case No. SCSL-04-15-T, Trial Judgment, ¶ 145.

<sup>102</sup> See *id.* ¶ 143.

<sup>103</sup> *Id.* ¶ 145 (footnote omitted).

<sup>104</sup> See Assembly of Parties to the Rome Statute, *supra* note 85, art. 7(1)(g)-1, 8(2)(b)(xxii)-1, 8(2)(e)(vi)-1.

<sup>105</sup> See *id.*; *Kunarac*, Case Nos. IT-96-23-T & IT-96-23/1-T, Trial Judgment, ¶ 460. Although the third paragraph does not fall within the ICC's definition of rape, the ICC incorporates a similar mens rea requirement pursuant to Article Thirty of the Rome Statute. See Rome Statute, *supra* note 84, art. 30(1) (requiring the material elements of a crime to be "committed with intent and knowledge").

<sup>106</sup> See Case No. SCSL-04-15-T, Trial Judgment, ¶¶ 146-148.

provision refers to the penetration of any part of the body of either the victim or the Accused with a sexual organ. The “any part of the body” in this part includes genital, anal or oral penetration. The second part of the provision refers to the penetration of the genital or anal opening of the victim with any object or any other part of the body. This part is meant to cover penetration with something other than a sexual organ which could include either other body parts or any other object. This definition of invasion is broad enough to be gender neutral as both men and women can be victims of rape.<sup>107</sup>

The decision went on to explain the role of the second paragraph as follows:

The second element of the *actus reus* of rape refers to the circumstances which would render the sexual act in the first element criminal. The essence of this element is that it describes those circumstances in which the person could not be said to have voluntarily and genuinely consented to the act. The use or threat of force provides clear evidence of non-consent, but it is not required. The ICTY Appeals Chamber has emphasized that the circumstances that prevail in most cases charged as either war crimes or crimes against humanity will be almost universally coercive. That is to say, true consent will not be possible.

... The last part of this element refers to those situations where, even in the absence of force or coercion, a person cannot be said to genuinely have consented to the act. A person may not, for instance, be capable of genuinely consenting if he or she is too young, under the influence of some substance, or suffering from an illness or disability.<sup>108</sup>

The above explanation in relation to the second paragraph of the definition is confusing. Paragraph 147 of the decision refers to the *Kunarac* appeal judgment as describing circumstances relating to “lack of consent.”<sup>109</sup> Other than the limited circumstances in the final portion of the second element (which are not being construed in this paragraph), “lack of consent” is not an element of this definition.<sup>110</sup> In

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<sup>107</sup> *Id.* ¶ 146 (footnotes omitted).

<sup>108</sup> *Id.* ¶¶ 147–148 (footnotes and internal quotation marks omitted).

<sup>109</sup> *See id.* ¶ 147.

<sup>110</sup> *See id.* ¶ 145.



fact, this portion of the definition derives from the ICC elements of the crime of rape, where “lack of consent” was rejected as an element.<sup>111</sup> Consequently, it is unclear what this reasoning in *Sesay* was intended to accomplish.

The *Sesay* decision also added a two-part mens rea requirement.<sup>112</sup> As noted, the mens rea requirement for lack of consent was not included in the ICC’s definition, but rather derived from the *Kunarac* trial judgment.<sup>113</sup> The *Sesay* decision provided no explanation for including this special mens rea.<sup>114</sup> Moreover, because lack of consent was not an element of the definition that this trial chamber had adopted, there was no reason to require that the accused possess some level of knowledge that the victim was not consenting to the act.<sup>115</sup>

Although the issue of mens rea played no significant role in the *Sesay* case, it was an important issue in the *Kunarac* trial judgment.<sup>116</sup> In *Kunarac*, the accused submitted that he was unaware that another soldier had threatened to kill the victim if she did not “satisfy the desires of his commander,” and thus believed that the victim voluntarily consented to sexual relations with him.<sup>117</sup> The trial panel rejected this position, finding instead that the accused possessed knowledge of certain circumstances that illustrated the victim’s lack of consent.<sup>118</sup> The accused was aware that the victim was a detainee, that she and other women were being raped, that she was in fear for her life, and that the situation for Muslim women in the area was generally very difficult.<sup>119</sup> As a result, the accused knew that the victim was not voluntarily consenting to sexual activity.<sup>120</sup>

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<sup>111</sup> See Assembly of Parties to the Rome Statute, *supra* note 85, art. 7(1)(g)-1, 8(2)(b)(xxii)-1, 8(2)(c)(vi)-1.

<sup>112</sup> See Case No. SCSL-04-15-T, Trial Judgment, ¶ 145.

<sup>113</sup> Compare Assembly of Parties to the Rome Statute, *supra* note 85, art. 7(1)(g)-1, 8(2)(b)(xxii)-1, 8(2)(c)(vi)-1 (illustrating that knowledge of lack of consent is not an ICC element of rape), with *Kunarac*, Case Nos. IT-96-23-T & IT-96-23/1-T, Trial Judgment, ¶ 460 (requiring knowledge of lack of consent).

<sup>114</sup> See Case No. SCSL-04-15-T, Trial Judgment, ¶¶ 143–148.

<sup>115</sup> Issues relating to the definition of the crime of rape were not raised on appeal. See Prosecutor v. Sesay, Kallon & Gbao, Case No. SCSL-04-15-A, Appeal Judgment, ¶¶ 85–92 (Oct. 26, 2009), <http://www.sc-sl.org/LinkClick.aspx?fileticket=CGgVJRtNF7M%3d&tabid=218>.

<sup>116</sup> See *Kunarac*, Case Nos. IT-96-23-T & IT-96-23/1-T, Trial Judgment, ¶¶ 645–647; *Sesay*, Case No. SCSL-04-15-T, Trial Judgment, ¶¶ 143–148.

<sup>117</sup> Case Nos. IT-96-23-T & IT-96-23/1-T, Trial Judgment, ¶¶ 645–647.

<sup>118</sup> *Id.* ¶¶ 646–647.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

A review of the mens rea requirement in *Sesay*, however, indicates that it is different from the mens rea requirement adopted in the *Kunarac* trial judgment. Recall that the *Kunarac* mens rea elements required the “intention to effect . . . sexual penetration, and the knowledge that it occurs without the consent of the victim.”<sup>121</sup> In contrast, the *Sesay* decision allows for the prosecutor to establish an accused’s mens rea in different ways.<sup>122</sup> The first part of the mens rea element calls for proof that the accused “intended to effect the sexual penetration *or* acted in the reasonable knowledge that this was likely to occur.”<sup>123</sup> The second part calls for proof that the accused either “knew *or* had reason to know that the victim did not consent.”<sup>124</sup> With regard to the latter requirement, it may be deemed proven “if the Prosecution establishes beyond reasonable doubt that the accused was aware, or had reason to be aware, of the coercive circumstances that undermined the possibility of genuine consent.”<sup>125</sup> The “had reason to know” clause allows the prosecution to establish the required mens rea in situations where the accused denies having actual knowledge of the alleged victim’s lack of consent.<sup>126</sup>

#### D. *Conclusions from the International Tribunals’ Definitions*

Although there has been a great deal of jurisprudence discussing the definition of the crime of rape over the past fourteen years, there is still no consensus as to the appropriate definition in international criminal law.<sup>127</sup> Although the ICC definition appears to be the most progressive, the second part of its mens rea element unnecessarily al-

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<sup>121</sup> *Id.* ¶ 460.

<sup>122</sup> Case No. SCSL-04-15-T, Trial Judgment, ¶ 145.

<sup>123</sup> *Id.* (emphasis added).

<sup>124</sup> *Id.* (emphasis added).

<sup>125</sup> *Gacumbitsi*, Case No. ICTR-2001-64-A, Appeal Judgment, ¶ 157; *cf.* Prosecutor v. Hadžihasanović & Kubura, Case No. IT-01-47-T, Trial Judgment, ¶¶ 91, 95 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 15, 2006), [http://www.icty.org/x/cases/hadzihasanovic\\_kubura/tjug/en/had-judg060315c.pdf](http://www.icty.org/x/cases/hadzihasanovic_kubura/tjug/en/had-judg060315c.pdf) (noting that the mens rea for command responsibility requires that the accused “knew or had reason to know that his subordinates were about to commit a crime or had done so,” and explaining that the latter requirement may be satisfied if “specific information was available to him which would have put him on notice of offences committed or about to be committed”).

<sup>126</sup> See Prosecutor v. Strugar, Case No. IT-01-42-A, Appeal Judgment, ¶¶ 299–301 & n.748 (Int’l Crim. Trib. for the Former Yugoslavia July 17, 2008), <http://www.icty.org/x/cases/strugar/acjug/en/080717.pdf> (referring to cases where a commander had no actual knowledge of the crimes being committed, but was still liable because he had reason to know of the crimes).

<sup>127</sup> See *supra* notes 11–126 and accompanying text.

lows the introduction of a mistake of fact defense.<sup>128</sup> Thus, each of the definitions that the tribunals have adopted presents various issues and questions for further review. Part IV of this Article will provide recommendations for modifying these definitions.<sup>129</sup>

## II. PROVING LACK OF CONSENT AND COERCION

### A. *Proof of Consent and Coercion in the International Criminal Tribunals*

Each of the cases mentioned in Part I considers the relationship between the circumstances of the alleged rape and the need to prove the elements of non-consent or coercion.<sup>130</sup> In these cases, the courts recognize that the situation during wartime is quite different from the circumstances in a national jurisdiction in peacetime. In such coercive circumstances, a question may be raised as to whether any real consent is possible.<sup>131</sup> Each of the courts indicated that numerous factors could vitiate consent or establish coercion.

Initially, the tribunals recognized the circumstances inherent during wartime situations that would establish the necessary element of coercion or would vitiate true consent. For example, the *Prosecutor v. Akayesu* trial judgment explained that a show of physical force is not necessary to establish coercive circumstances.<sup>132</sup> Forms of duress, such

<sup>128</sup> See *supra* notes 92–94 and accompanying text.

<sup>129</sup> See *infra* notes 199–215 and accompanying text.

<sup>130</sup> See, e.g., *Prosecutor v. Kunarac, Kovac & Vukovic*, Case Nos. IT-96-23-T & IT-96-23/1-T, Appeal Judgment, ¶ 129 (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2002), <http://www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf> (holding that force, although not an element of rape, is clear evidence of lack of consent); *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Trial Judgment, ¶ 185 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998), <http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf> (holding that coercion includes threats made against a third person); *Gacumbitsi v. Prosecutor*, Case No. ICTR-2001-64-A, Appeal Judgment, ¶ 153 (July 7, 2006), [http://www.unictr.org/Portals/0/Case/English/Gacumbitsi/judgement/judgement\\_appeals\\_070706.pdf](http://www.unictr.org/Portals/0/Case/English/Gacumbitsi/judgement/judgement_appeals_070706.pdf) (holding that lack of consent is an element of rape); *Prosecutor v. Muhimana*, Case No. ICTR-95-1B-T, Trial Judgment and Sentence, ¶ 550 (Apr. 28, 2005), <http://www.unictr.org/Portals/0/Case/English/Muhimana/decisions/muhimana280505.pdf> (endorsing a broad definition of coercion); *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Judgment, ¶ 688 (Sept. 2, 1998), <http://www.unictr.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf> (holding that coercion may be inherent in armed conflict and refugee crises); *supra* notes 11–126 and accompanying text.

<sup>131</sup> See Schomburg & Peterson, *supra* note 64, at 138 (noting that genocide, crimes against humanity, and war crimes occur during inherently coercive circumstances that make “genuine consent . . . impossible,” and thus “consent cannot be considered the nub of crimes of sexual violence within the framework of international criminal law”).

<sup>132</sup> Case No. ICTR-96-4-T, Trial Judgment, ¶ 688 (assessing inconsistencies in victims' testimony in light of presumed post-traumatic and extreme stress disorders).

as threats or intimidation, may constitute coercion because they prey on the fear or desperation of victims.<sup>133</sup> These pressures, in turn, may be inherent in armed conflicts or refugee crises involving a military presence.<sup>134</sup> Similarly, the *Prosecutor v. Muhimana* trial judgment reasoned that most cases charged under international criminal law, including genocide, crimes against humanity, and war crimes, will almost universally involve coercive circumstances.<sup>135</sup> Furthermore, the *Prosecutor v. Furundžija* trial judgment established a standard for dealing with rape cases emanating from prison camps or detention facilities, holding that the circumstances surrounding captivity preclude consent.<sup>136</sup>

As such, the *Gacumbitsi v. Prosecutor* appeal judgment noted that the existence of these circumstances of detention is sufficient for proving, beyond a reasonable doubt, lack of consent.<sup>137</sup> The appeals chamber explained that a court is free to infer non-consent from the attendant circumstances, notwithstanding the victim's or perpetrator's other relevant conduct.<sup>138</sup>

The *Prosecutor v. Kunarac* appeal judgment even referred to domestic laws where there is a presumption of lack of consent, thus transforming sexual intercourse into rape.<sup>139</sup> Specifically, the appeals chamber referred to statutes imposing strict liability in the case of sexual relations between a prison guard and an inmate.<sup>140</sup> Although the chamber noted that such laws highlight "the need to presume non-consent," it did not adopt this position.<sup>141</sup>

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Muhimana*, Case No. ICTR-95-1B-T, Trial Judgment and Sentence, ¶ 546; *accord Kunarac*, Case Nos. IT-96-23-T & IT-96-23/1-T, Appeal Judgment, ¶ 130.

<sup>136</sup> *Furundžija*, Trial Judgment, Case No. IT-95-17/1-T, ¶ 271; *accord* *Prosecutor v. Kvočka, Radić, Žigić & Prcać*, Case No. IT-98-30/1-A, Appeal Judgment, ¶ 396 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2005), <http://www.icty.org/x/cases/kvocka/acjug/en/kvo-aj050228e.pdf>.

<sup>137</sup> *Gacumbitsi*, No. ICTR-2001-64-A, Appeal Judgment, ¶ 155.

<sup>138</sup> *Id.*

<sup>139</sup> *Kunarac*, Case Nos. IT-96-23-T & IT-96-23/1-T, Appeal Judgment, ¶¶ 130–131 & nn.161–64.

<sup>140</sup> *Id.* ¶ 131 n.163 (citing N.J. STAT. ANN. § 2C:14-2(c)(2) (West 2012) (prohibiting sexual penetration of a person in prison by an actor who has supervisory or disciplinary authority over the victim)).

<sup>141</sup> *Id.* ¶¶ 131, 133; *see also* Schomburg & Peterson, *supra* note 64, at 138–39 (“[V]arious states criminalize sexual acts between individuals in unequal positions of power, irrespective of the consent of the victim. If international criminal law relied at all on domestic law to define sexual violence, it should draw from such examples instead of general provisions that focus on consent.” (footnote omitted)).

Although tribunals have spoken approvingly of a presumption of non-consent or coercion during detention or in other war crimes situations, they have failed to adopt this position.<sup>142</sup> This failure apparently stems from the tension related to balancing the need for fairness to the victim against the need to protect the rights of the accused. A review of the decisions construing ICTY rules dealing with the issue of consent illustrates this tension.

### B. *The ICTY Rules Relating to Consent*

Rule 96 of the ICTY's Rules of Procedure and Evidence sets parameters for the tribunal's consideration of consent.<sup>143</sup> In general, consent cannot be a defense if a victim has been subjected to coercive circumstances or if the victim reasonably believes that submitting to a perpetrator's demands will prevent subjecting a third party to similar threats.<sup>144</sup> Similar rules were adopted for courts and tribunals in Rwanda,<sup>145</sup> Sierra Leone,<sup>146</sup> and Bosnia and Herzegovina,<sup>147</sup> as well as

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<sup>142</sup> See, e.g., *Gacumbitsi*, Case No. ICTR-2001-64-A, Appeal Judgment, ¶ 155 (noting that the trial chamber is free to infer non-consent from background circumstances such as genocide or detention); *Kunarac*, Case Nos. IT-96-23 & IT-96-23/1-A, Appeal Judgment, ¶¶ 131, 133 (noting that it is a federal offense in the United States for a prison guard to have sexual relations with an inmate regardless of whether or not the inmate consents).

<sup>143</sup> INT'L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA R. P. & EVID. 96, [http://www.icty.org/x/file/Legal%20Library/Rules\\_procedure\\_evidence/IT032Rev48\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev48_en.pdf). The pertinent portion of Rule 96 states that in cases of sexual assault:

- (ii) consent shall not be allowed as a defence if the victim
  - (a) has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression, or
  - (b) reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear;
  - (iii) before evidence of the victim's consent is admitted, the accused shall satisfy the Trial Chamber in camera that the evidence is relevant and credible
- ....

*Id.*

<sup>144</sup> *Id.*

<sup>145</sup> INT'L CRIM. TRIB. FOR RWANDA R. P. & EVID. 96(ii)–(iii), <http://www.unictr.org/Portals/0/English/Legal/ROP/100209.pdf>.

<sup>146</sup> SPEC. CT. FOR SIERRA LEONE R. P. & EVID. 96(i)–(iii), <http://www.sc-sl.org/LinkClick.aspx?fileticket=Psp%2bFh0%2bwSI%3d&tabid=176>. This portion of the Rule was taken verbatim from INT'L CRIM. CT. R. P. & EVID. 70(a)–(c), [http://www.icc-cpi.int/en\\_menus/icc/legal%20texts%20and%20tools/official%20journal/Documents/RPE.4th.ENG.08Feb1200.pdf](http://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/official%20journal/Documents/RPE.4th.ENG.08Feb1200.pdf). Rule 70 states:

In cases of sexual violence, the Court shall be guided by and, where appropriate, apply the following principles:

- (a) Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive envi-

for the International Criminal Court.<sup>148</sup> Relying on Rule 96, the prosecution argued in *Kunarac* that lack of consent was not an element of rape, but rather that consent was an affirmative defense.<sup>149</sup> The trial chamber, however, rejected this argument, reasoning that lack of consent is an element of the crime of rape and that Rule 96 refers to some, but obviously not all, of the matters that negate consent.<sup>150</sup> The chamber explained that when a witness is subjected to the factors listed in the second paragraph of Rule 96, such as threats, duress, detention, or being put in fear, the victim cannot freely give consent, thereby satisfying the second prong of the trial chamber's definition of the crime of rape.<sup>151</sup>

After determining that such circumstances negate consent, the chamber then referred to the factors listed in Rule 96, stating that "the reference to them . . . serves to reinforce the requirement that consent will be considered to be absent in those circumstances *unless freely given*."<sup>152</sup> This sentence is not only internally conflicting, but is at variance with the prior sentence and the Rule.<sup>153</sup> Specifically, the chamber

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ronment undermined the victim's ability to give voluntary and genuine consent;

(b) Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent;

(c) Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence . . . .

*Id.*

<sup>147</sup> CRIM. P. CODE OF BOSN. & HERZ. art. 264(3)–(5), [http://www.coe.int/t/dlapil/co-dexter/Source/country\\_profiles/legislation/CT%20Legislation%20-%20BiH%20Criminal%20Procedure%20Code.pdf](http://www.coe.int/t/dlapil/co-dexter/Source/country_profiles/legislation/CT%20Legislation%20-%20BiH%20Criminal%20Procedure%20Code.pdf). Rule 264 states:

(3) In the case of the criminal offense against humanity and values protected by the international law, the consent of the victim may not be used in a [sic] favor of the defense.

(4) Before admitting evidence pursuant to this Article, the Court must conduct an appropriate hearing *in camera*.

(5) The motion, supporting documents and the record of the hearing must be sealed in a separate envelope, unless the Court orders otherwise.

*Id.*

<sup>148</sup> INT'L CRIM. CT. R. P. & EVID. 70(a)–(c).

<sup>149</sup> *Kunarac*, Case Nos. IT-96-23-T & IT-96-23/1-T, Trial Judgment, ¶ 461.

<sup>150</sup> *Id.* ¶ 464.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* (emphasis added).

<sup>153</sup> Compare INT'L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA R. P. & EVID. 96 (eliminating consent as a possible defense when violence, duress, detention, or psychological oppression are present or reasonably feared), with *Kunarac*, Case Nos. IT-96-23-T & IT-96-23/1-T, Trial Judgment, ¶ 464 (implying that voluntary consent is still possible, notwith-

initially stated that there can be no voluntary consent if the referenced circumstances exist, but then indicated that a person can still voluntarily consent in such circumstances.<sup>154</sup> It appears that the chamber—attempting to balance the rights of the victim and those of the accused—took great effort to avoid establishing a strict liability crime.<sup>155</sup>

The prosecution in the *Gacumbitsi* appeal raised a similar issue.<sup>156</sup> The appeals chamber stated that Rule 96 simply describes when evidence of consent is admissible.<sup>157</sup> The panel explained that although the accused may introduce evidence of consent to create a reasonable doubt defense, such evidence may still be inadmissible pursuant to Rule 96(ii).<sup>158</sup> Additionally, a trial chamber is free to disregard admitted evidence of consent if it concludes that, under the circumstances, the consent was not voluntary.<sup>159</sup>

These are just some of the many issues that relate to the element of lack of consent. Whether construing Rule 96 or determining whether consent is an element of the crime of rape, the courts and tribunals will continue to deal with this matter.

### III. PROGRESSIVE POLICIES AND DETERMINATIONS IN DEALING WITH THE CRIME OF RAPE

Although courts and tribunals continue to struggle over substantive issues relating to the crime of rape, rules and decisions indicate that some advances have been made on procedural and evidentiary matters.<sup>160</sup> This Part highlights some of the most notable examples.

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standing the presence or threat of violence, duress, detention, or psychological oppression).

<sup>154</sup> See *Kunarac*, Case Nos. IT-96-23-T & IT-96-23/1-T, Trial Judgment, ¶ 464.

<sup>155</sup> See *id.* Although the Court of Bosnia and Herzegovina has a statute prohibiting the use of the consent defense in war crimes cases alleging rape, such defenses are apparently still allowed to protect the rights of the accused. See, e.g., *Prosecutor v. Pinčić*, Case No. X-KR-08/502, Trial Verdict, 16, 41 (Ct. of Bosn. & Herz. Nov. 28, 2008); see also CLAIRE DE THAN & EDWIN SHORTS, *INTERNATIONAL CRIMINAL LAW AND HUMAN RIGHTS* 359 (2003) (noting that the final version of Rule 96 appears to be the result of a “compromise between the rights of the defendant and victim”).

<sup>156</sup> See *Gacumbitsi*, Case No. ICTR-2001-64-A, Appeal Judgment, ¶ 155.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* ¶ 156; INT’L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA R. P. & EVID. 96.

<sup>159</sup> *Gacumbitsi*, Case No. ICTR-2001-64-A, Appeal Judgment, ¶ 156.

<sup>160</sup> See *infra* notes 161–198 and accompanying text.

### A. Corroboration of the Victim's Testimony Is Not Required

For many years, certain jurisdictions required corroboration of a victim's testimony in order to sustain a conviction for the crime of rape.<sup>161</sup> The requirement of corroboration emanates from Lord Chief Justice Hale's assertion in the latter part of the seventeenth century that rape "is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent."<sup>162</sup> One of the key reasons for this requirement is the unsupported view that false rape charges outnumber false charges of other crimes.<sup>163</sup>

This requirement has now been abandoned in a number of jurisdictions.<sup>164</sup> For example, over the past fifty years in the United States, a number of states have repealed the corroboration requirement.<sup>165</sup> Most of the war crimes tribunals have also rejected the outdated corroboration requirement.<sup>166</sup> The ICTY, ICTR, and ICC have adopted procedural rules indicating that corroboration of the victim's testimony is not required in cases of sexual assault or violence.<sup>167</sup> As such, in 1997, in *Prosecutor v. Tadić*, the ICTY trial chamber explained that the rule rejecting a corroboration requirement in sexual assault cases "accords to the testimony of a victim of sexual assault the same presumption of reliability as the testimony of victims of other crimes, something long

<sup>161</sup> Note, *The Rape Corroboration Requirement: Repeal Not Reform*, 81 YALE L.J. 1365, 1367 (1972) [hereinafter *Repeal Not Reform*]; see, e.g., *Davis v. State*, 48 S.E. 180, 181 (Ga. 1904) (requiring corroboration to prove rape); *State v. Connelly*, 59 N.W. 479, 481 (Minn. 1894) (reasoning that any woman who is actually raped would likely tell a third person about the incident).

<sup>162</sup> 1 MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 634 (Thomas Dogherty ed., E. Rider, Little-Britain 1800) (1736).

<sup>163</sup> See *United States v. Wiley*, 492 F.2d 547, 553 (D.C. Cir. 1973) (Bazelon, J., concurring).

<sup>164</sup> See, e.g., Criminal Code, R.S.C. 1985, c. C-46, § 274 (Can.) (repudiating the corroboration requirement); *Hodges v. State*, 197 S.W.2d 52, 53 (Ark. 1946) (same); *McQueary v. People*, 110 P. 210, 212-13 (Colo. 1910) (same); *State v. Bashaw*, 672 P.2d 48, 49 (Or. 1983) (same).

<sup>165</sup> See *United States v. Sheppard*, 569 F.2d 114, 117 & n.7 (D.C. Cir. 1977); *Hodges*, 197 S.W.2d at 53; *Bashaw*, 672 P.2d at 49; *Repeal Not Reform*, *supra* note 161, at 1367.

<sup>166</sup> See INT'L CRIM. CT. R. P. & EVID. 63(4), [http://www.icc-cpi.int/en\\_menus/icc/legal%20texts%20and%20tools/official%20journal/Documents/RPE.4th.ENG.08Feb1200.pdf](http://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/official%20journal/Documents/RPE.4th.ENG.08Feb1200.pdf); INT'L CRIM. TRIB. FOR RWANDA R. P. & EVID. 96(i), <http://www.unict.org/Portals/0/English/Legal/ROP/100209.pdf>; INT'L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA R. P. & EVID. 96(i), [http://www.icty.org/x/file/Legal%20Library/Rules\\_procedure\\_evidence/IT032Rev48\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev48_en.pdf). But see generally CRIM. P. CODE OF BOSN. & HERZ. (2003), [http://www.coe.int/t/dlapil/codexter/Source/country\\_profiles/legislation/CT%20Legislation%20-%20BiH%20Criminal%20Procedure%20Code.pdf](http://www.coe.int/t/dlapil/codexter/Source/country_profiles/legislation/CT%20Legislation%20-%20BiH%20Criminal%20Procedure%20Code.pdf) (providing no rule regarding corroboration of a rape victim's testimony); SPEC. CT. FOR SIERRA LEONE R. P. & EVID., <http://www.sc-sl.org/LinkClick.aspx?fileticket=Psp%2bFh0%2bwSI%3d&tabid=176> (same).

<sup>167</sup> See *supra* note 166.



denied to victims of sexual assault by the common law.”<sup>168</sup> Even in cases where the accused argues that a victim’s age or personal trauma undermines his or her credibility, the corroboration requirement has been consistently rejected.<sup>169</sup>

### B. Rejection of a “Resistance Requirement”

The resistance requirement is a common law feature that has been the subject of criticism in recent times.<sup>170</sup> As with the corroboration rule, the resistance requirement is based on the practice of distrusting the testimony of an alleged rape victim.<sup>171</sup> In some jurisdictions within the United States, the requirement that a victim resist to the “utmost” or “until exhausted or overpowered”<sup>172</sup> has been rejected as unreasonable and outdated.<sup>173</sup>

The international criminal tribunals have also rejected this requirement. Although the accused argued in the 2002 *Prosecutor v. Kunarac* ICTY appeal judgment that “continuous” and “genuine” resistance should be an element of rape, the chamber summarily rejected that

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<sup>168</sup> Case No. IT-94-I-T, Trial Opinion & Judgment, ¶ 536 & n.33 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997), <http://www.icty.org/x/cases/tadic/tjug/en/tad-tsj70507JT2-e.pdf> (citing 1 VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER’S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 263 (1995)).

<sup>169</sup> See e.g., *Prosecutor v. Kunarac, Kovac & Vokovic*, Case Nos. IT-96-23-T & IT-96-23/1-T, Trial Judgment, ¶ 566 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001), <http://www.icty.org/x/cases/kunarac/tjug/en/kun-tj010222e.pdf>; *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Trial Judgment, ¶ 271 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998), <http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf>.

<sup>170</sup> See, e.g., *People v. Barnes*, 721 P.2d 110, 117 (Cal. 1986) (criticizing the “utmost resistance” requirement as primitive); Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1091 (1986) (arguing that the continued use of the resistance requirement provides evidence that sexism pervades the law of rape).

<sup>171</sup> *Barnes*, 721 P.2d at 117–18 (noting that the resistance requirement “appears to have been grounded in the basic distrust with which courts and commentators traditionally viewed a woman’s testimony regarding sexual assault”); *People v. Rincon-Pineda*, 538 P.2d 247, 251–52 (Cal. 1975) (describing the trial court’s warning that an unchaste woman is less likely to be credible); Estrich, *supra* note 170, at 1105 (noting that distrust of women is pervasive in the law of rape).

<sup>172</sup> See, e.g., *People v. Dohring*, 59 N.Y. 374, 384 (1874) (holding that a woman must resist to the “extent of her ability”); *Brown v. State*, 106 N.W. 536, 538 (Wis. 1906) (requiring the alleged rape victim to demonstrate “the most vehement exercise of every physical means or faculty” to prove that a rape has occurred).

<sup>173</sup> See, e.g., *Barnes*, 721 P.2d at 117 (noting that only force, not resistance, is required to prove rape); *State v. Mackor*, 527 A.2d 710, 714–15 (Conn. App. Ct. 1987) (same); *State v. McKnight*, 774 P.2d 532, 534 (Wash. Ct. App. 1989) (holding that only reasonable, rather than utmost, resistance is required, while taking into account the circumstances surrounding the act).

argument.<sup>174</sup> The appeals tribunal further noted that the appellant's contention that a requirement of continuous resistance is necessary to provide notice of non-consent "is wrong on the law and absurd on the facts."<sup>175</sup> This same argument was raised and rejected in the 2005 ICTY appeal judgment in *Prosecutor v. Kvočka, Radić, Žigić & Prcać*.<sup>176</sup> Although the argument has not been raised since or adopted as an element of the crime of rape by any tribunal, some form of this rule is still a requirement in some American states.<sup>177</sup>

### C. Rape Shield Rules

For many years, at a trial for rape the defense attorneys would place the alleged victim on trial by inquiring into her prior sexual activity and introducing evidence of her lack of chastity.<sup>178</sup> This strategy resulted in harassment and further humiliation of the victim, and also served to discourage victims of rape from reporting their crimes to law enforcement authorities.<sup>179</sup>

Rape shield rules or statutes were introduced to eliminate this common defense strategy.<sup>180</sup> Similarly, war crimes courts and tribunals have accepted the concept of, and need for, rape shield rules to protect victims from harassing questions that are not relevant to the issues at

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<sup>174</sup> *Prosecutor v. Kunarac, Kovac & Vukovic*, Case Nos. IT-96-23 & IT-96-23/1-A, Appeal Judgment, ¶¶ 125, 128 (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2002), <http://www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf>.

<sup>175</sup> *Id.* ¶ 128.

<sup>176</sup> Case No. IT-98-30/1-A, Appeal Judgment, ¶¶ 393, 395 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2005), <http://www.icty.org/x/cases/kvocka/acjug/en/kvo-aj050228e.pdf>.

<sup>177</sup> See, e.g., *People v. Dorsey*, 429 N.Y.2d 828, 832 (1980) (noting that New York requires only a showing of "earnest resistance"); *McKnight*, 774 P.2d at 534 (noting that proof of rape requires a showing of reasonable resistance in Washington).

<sup>178</sup> See Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 13 (1977) (illustrating the courtroom tactic of placing the victim "on trial"); see also *People v. Collins*, 186 N.E.2d 30, 33 (Ill. 1962) (noting that it is more likely that an unchaste woman assented to sexual activity); *People v. Abbot*, 19 Wend. 192, 195–96 (N.Y. 1838) (same).

<sup>179</sup> See, e.g., *Bloch v. Ribar*, 156 F.3d 673, 685 (6th Cir. 1998) (discussing how a trial forces humiliation upon rape victims); *Commonwealth v. Harris*, 825 N.E.2d 58, 65 (Mass. 2005) (same); Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013, 1062–63 (1991) (noting that rape victims often do not press charges in order to avoid the ordeal of trial).

<sup>180</sup> See, e.g., *Bloch*, 156 F.3d at 685 (noting that one impetus for the passage of rape shield statutes is the need to protect victims from personal attacks); *Harris*, 825 N.E.2d at 65; Torrey, *supra* note 179, at 1062–63 (noting that rape shield laws were passed in order to alleviate the burdens placed on rape victims during trial).

trial.<sup>181</sup> The ICTY and ICTR do not permit the introduction of evidence of prior sexual conduct of an alleged rape victim.<sup>182</sup> The ICC rule is more comprehensive and does not admit evidence of prior or subsequent sexual activity.<sup>183</sup> Accordingly, the ICC and SCSL rules prohibit a court from using a victim's sexual history to determine issues of credibility, character, or sexual predisposition.<sup>184</sup>

#### D. Post-Traumatic Stress Disorder

A victim's post-traumatic stress disorder (PTSD) presents another opportunity for defense attorneys to undermine a victim's credibility. In two cases, although the accused attempted to use this approach to limit the validity of rape victims' testimony, the trial and appellate panels rejected these attempts.<sup>185</sup> For example, in the 1998 *Prosecutor v. Furundžija* ICTY trial judgment, the trial panel assessed whether a rape victim suffering with PTSD could be a reliable witness.<sup>186</sup> Four expert witnesses testified on this matter at a hearing.<sup>187</sup> The trial chamber ruled that the testimony of persons suffering from PTSD is not "necessarily inaccurate."<sup>188</sup> Accordingly, the trial panel reasoned that a person with PTSD is still capable of being a reliable witness.<sup>189</sup> On appeal, the appellate panel affirmed the trial chamber's ruling on this issue.<sup>190</sup>

A related argument was raised in the *Kunarac* appeal judgment.<sup>191</sup> The appellant submitted that it was error to rely on the testimony of rape victims due to their young age and the traumatic experience they

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<sup>181</sup> See *infra* notes 182–184 and accompanying text. This view is consistent with the approach taken in national jurisdictions. See Criminal Code, R.S.C. 1985, c. C-46, § 276 (Can.); DRESSLER, *supra* note 16, §§ 33.01[B], 33.07[B], at 568, 591–93.

<sup>182</sup> See CRIM. P. CODE OF BOSN. & HERZ. art. 264(1) (2003) ("The evidence offered to prove that injured party was engaged in other events related to sexual behavior and to prove a sexual predisposition of the injured party is not admissible."); INT'L CRIM. TRIB. FOR RWANDA R. P. & EVID. 96(iv) ("Prior sexual conduct of the victim shall not be admitted in evidence or as defence."); INT'L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA R. P. & EVID. 96(iv) ("[P]rior sexual conduct of the victim shall not be admitted in evidence.").

<sup>183</sup> See INT'L CRIM. CT. R. P. & EVID. 71.

<sup>184</sup> See *id.* 70(d); SPEC. CT. FOR SIERRA LEONE R. P. & EVID. 96(iv).

<sup>185</sup> See *Kunarac*, Case Nos. IT-96-23-T & IT-96-23/1-T, Appeal Judgment, ¶¶ 272, 279, 281; *Prosecutor v. Furundžija*, Case No. IT-95-17/1-A, Appeal Judgment, ¶¶ 98, 122–123 (Int'l Crim. Trib. for the Former Yugoslavia July 21, 2000), <http://www.icty.org/x/cases/furundzija/acjug/en/fur-aj000721e.pdf>.

<sup>186</sup> *Furundžija*, No. IT-95-17/1-T, Trial Judgment, ¶¶ 96–106.

<sup>187</sup> *Id.* ¶ 95.

<sup>188</sup> *Id.* ¶ 109.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* ¶¶ 122–123.

<sup>191</sup> See *Kunarac*, Case Nos. IT-96-23 & IT-96-23/1-A, Appeal Judgment, ¶ 272.

suffered.<sup>192</sup> The appeals chamber again rejected this claim, determining that the trial chamber could have properly relied on such testimony.<sup>193</sup>

These tribunals understand that the alleged crimes before them occurred during armed conflicts. They also recognize that certain victims and witnesses have been severely traumatized and suffer from PTSD. As such, the tribunals have been sensitive to these problems in determining the reliability of victims and witnesses' testimony.<sup>194</sup>

#### E. Gender-Neutral Evaluations

International courts and tribunals in general view the crime of rape as gender neutral. As noted above, the definitions of rape in the ICTR (as evidenced by the *Prosecutor v. Akayesu* trial judgment) and in the ICC apply to both male and female victims.<sup>195</sup> The *Furundžija* trial judgment, in which the ICTY trial panel surveyed the law of rape in major legal systems, noted that the laws of some countries allow for males to be victims of rape.<sup>196</sup> Although the panel did not indicate whether it would adopt this position, later ICTY cases convicted the accused of raping male victims.<sup>197</sup> Thus, the notion that the crime of rape is gender neutral under international law is consistent with the modern and prevailing view in many national jurisdictions.<sup>198</sup>

### IV. RECOMMENDATIONS

A number of modifications are needed to improve or update the laws or procedures relating to the crime of rape. This Part offers some recommendations and shows that although some of these changes are straightforward, others are more complex.<sup>199</sup>

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<sup>192</sup> *Id.*

<sup>193</sup> *Id.* ¶¶ 279, 281.

<sup>194</sup> See, e.g., *Kunarac*, Case Nos. IT-96-23-T & IT-96-23/1-T, Trial Judgment, ¶ 564 (overlooking minor inconsistencies between witness statements as long as the testimony recounts the "essence of the incident charged in acceptable detail"); *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Judgment, ¶¶ 142–143 (Sept. 2, 1998), <http://www.unictr.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf> (assessing inconsistencies in victims' testimony in light of presumed post-traumatic and extreme stress disorders).

<sup>195</sup> See *supra* notes 21, 88 and accompanying text.

<sup>196</sup> *Furundžija*, Case No. IT-95-17/1-T, Trial Judgment, ¶¶ 180–183.

<sup>197</sup> *Id.* ¶ 180; see *supra* note 88 (summarizing cases).

<sup>198</sup> See *Furundžija*, Case No. IT-95-17/1-T, Trial Judgment, ¶ 180 & n.208; Deborah W. Denno, *Why the Model Penal Code's Sexual Offense Provisions Should Be Pulled and Replaced*, 1 OHIO ST. J. CRIM. L. 207, 211 (2003).

<sup>199</sup> See *infra* notes 200–215 and accompanying text.

### A. Rape Shield Rules

As noted above, rape shield rules have been established in many countries to protect victims from harassment and improper questioning.<sup>200</sup> The ICTY and ICTR Rules of Procedure and Evidence protect victims from inquiry into their sexual history prior to the alleged rape.<sup>201</sup> But, because the crimes alleged at those tribunals occurred in the 1990s, a more comprehensive form of protection is needed for victims. For example, the rules should be amended to prevent inquiry as to sexual activity that occurred subsequent to the alleged crime. This change would bring the rules in line with the more progressive position taken by the ICC and SCSL.<sup>202</sup>

### B. Abortion

As the rape shield rules demonstrate, victims must be protected from unfair and emotionally charged attacks on their credibility. The 2008 Court of Bosnia and Herzegovina case of *Prosecutor v. Vuković* illustrates the need for such protection.<sup>203</sup> In that case, a panel considered as relevant to the issue of credibility the fact that the victim did not obtain an abortion.<sup>204</sup> The victim testified that she was raped on several occasions by the accused and was eventually able to flee to a safer area.<sup>205</sup> After learning that she was pregnant, the victim gave birth to a child whom she then refused to see.<sup>206</sup> The court found that her failure to terminate her pregnancy was a factor negatively affecting her credibility.<sup>207</sup> Even though the court recognized that there may have been moral or religious reasons for not terminating her pregnancy, it nevertheless concluded that the victim was still expected to explain the reasons for her decision.<sup>208</sup>

The issue of abortion is a highly sensitive topic, and the court was correct in recognizing that there may be many reasons for not terminating a pregnancy. A victim's reasoning for not terminating a pregnancy, is not, however, probative of the issues relating to the crime of

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<sup>200</sup> See *supra* notes 178–184 and accompanying text.

<sup>201</sup> See *supra* note 182 and accompanying text.

<sup>202</sup> See *supra* notes 183–184 and accompanying text.

<sup>203</sup> See Case No. X-KRŽ-05/217, Trial Verdict, 5, 7–9 (Court of Bosn. & Herz. Aug. 13, 2008).

<sup>204</sup> *Id.* at 8–9.

<sup>205</sup> *Id.* at 5–6.

<sup>206</sup> *Id.* at 6.

<sup>207</sup> *Id.* at 8.

<sup>208</sup> *Id.* at 8–9.

rape.<sup>209</sup> Furthermore, because this matter is not relevant to either the issue of credibility or the element of lack of consent, it should not be considered in cases where the crime of rape is alleged.

### C. *The Issue of Consent*

The final recommendation concerns issues relating to consent (or the lack thereof). The *Prosecutor v. Kunarac* ICTY trial judgment added a two-part mens rea element to the crime of rape that requires the prosecutor to prove that the accused knew that the sexual penetration was not consensual.<sup>210</sup> Other tribunals have established similar requirements through their decisions or rules.<sup>211</sup>

Notwithstanding the decisions of these international tribunals, a mens rea element requiring knowledge as to lack of consent is unnecessary and should be eliminated. The decisions of war crimes tribunals provide no reason to support a special knowledge requirement, nor is there any explanation why it might be necessary in armed conflict situations. Moreover, many jurisdictions in the United States do not require knowledge or specific intent in relation to the lack of consent, regardless of the surrounding circumstances.<sup>212</sup>

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<sup>209</sup> See Melisa M. Holmes et al., *Rape-Related Pregnancy: Estimates and Descriptive Characteristics from a National Sample of Women*, 175 AM. J. OBSTETRICS & GYNECOLOGY 320, 322 (1996) (finding that, of rape-related pregnancies, 50% of women underwent abortions, 32.3% kept the infant, 5.9% placed the infant for adoption, and 11.8% resulted in spontaneous abortions).

<sup>210</sup> *Prosecutor v. Kunarac, Kovac & Vokovic*, Case Nos. IT-96-23-T & IT-96-23/1-T, Trial Judgment, ¶ 566 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001), <http://www.icty.org/x/cases/kunarac/tjug/en/kun-tj010222e.pdf>.

<sup>211</sup> See Rome Statute, *supra* note 84, art. 30(1); *Gacumbitsi v. Prosecutor*, Case No. ICTR-2001-64-A, Appeal Judgment, ¶¶ 152–153, 157 (July 7, 2006), [http://www.unictr.org/Portals/0/Case/English/Gacumbitsi/judgement/judgement\\_appeals\\_070706.pdf](http://www.unictr.org/Portals/0/Case/English/Gacumbitsi/judgement/judgement_appeals_070706.pdf); *Prosecutor v. Brima, Kamara & Kanu*, Case No. SCSL-2004-16-T, Trial Judgment, ¶ 693 (June 20, 2007), <http://www.scsl.org/LinkClick.aspx?fileticket=EqikfVSpLWM=&tabid=106>.

<sup>212</sup> See, e.g., *People v. Mayberry*, 542 P.2d 1337, 1345 (Cal. 1975) (en banc) (holding that a statutory rape provision did not eviscerate the requirement of simultaneous act and wrongful intent); *State v. Smith*, 554 A.2d 713, 715–16 (Conn. 1989) (holding that for the crime of rape, the perpetrator must only intend the general physical act of sexual intercourse and not the specific act of sexual intercourse without a person's consent); *Commonwealth v. Lopez*, 745 N.E.2d 961, 965 (Mass. 2001) (noting that “no mens rea or knowledge as to the lack of consent has ever been required” to determine that a rape has occurred); *State v. Reed*, 479 A.2d 1291, 1296 (Me. 1984) (holding that “no culpable state of mind” is required when rape is compelled by force or threat); see also Sexual Offences Act, 2003, c. 42, § 1(1)(c) (U.K.) (providing as an element of rape that the accused “does not reasonably believe” that the victim consented). See generally Cavallaro, *supra* note 94, at 819 (analyzing different jurisdictions' approaches as to whether the perpetrator must only know that his victim is not con-

Although an additional mens rea requirement may be needed to guarantee fairness to an accused facing allegations of date or acquaintance rape,<sup>213</sup> that situation is quite different from the coercive environment in an armed conflict situation. Moreover, the obligation of the prosecution to establish several elements beyond a reasonable doubt in order to obtain a conviction for the crime of rape adequately protects the accused.

Several other recommendations relating to the issue of consent could be discussed. One such recommendation is to adopt strict liability at the ICTY and ICTR in cases in which the alleged rape victim is a minor or a person suffering from a physical or mental disability.<sup>214</sup> It would also be beneficial to adopt a definition where the element of “lack of consent” would be a rebuttable presumption.<sup>215</sup> In the latter recommendation, the introduction of evidence of consent would still protect the accused. Issues relating to the crime of rape and particularly to consent, however, require further analysis and consideration than this short Article can provide.

### CONCLUSION

To improve fairness and effectiveness in prosecutions of rape as a war crime, international criminal tribunals should adopt the substantive and procedural modifications outlined above. Some tribunals have already adopted various progressive policies such as gender-neutral evaluations and rejection of a resistance requirement. Nonetheless, these tribunals should strengthen other substantive and procedural rules to enhance equitable results and to better align with many modern domestic laws. Specifically, they should strengthen rape shield rules, forbid evidence of a woman’s decision not to abort, and eliminate the requirement of knowledge of lack of consent. With many more war

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senting to the act or whether the perpetrator must know that his victim is not consenting and that he is engaging in the act through force).

<sup>213</sup> See 2 LAFAYE, *supra* note 16, § 17.4, at 639.

<sup>214</sup> For example, the ICC does not require knowledge of lack of consent as an element of rape. See Assembly of Parties to the Rome Statute, *supra* note 85, art. 7(1)(g)-I (requiring no mens rea because “the invasion was committed against a person incapable of giving genuine consent”); see also DE THAN & SHORTS, *supra* note 155, at 359 (arguing for a rule that a child below a certain age is incapable of giving consent).

<sup>215</sup> See Sexual Offences Act, c. 42, § 75 (establishing a rebuttable presumption of lack of consent in certain situations). But see GUÉNAËL METTRAUX, INTERNATIONAL CRIMES AND THE AD HOC TRIBUNALS 109 n.101 (2005) (“The question of true consent in the context of an armed conflict may prove a difficult one to deal with, but there may be no presumption that sexual intercourse between members of opposing parties is necessarily non-consensual.”).

crimes cases awaiting trial, war crimes courts and international criminal tribunals will have many opportunities to revisit these issues, and the jurisprudence will continue to evolve.